

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>GEORGIA R. KATZ</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,068,293
<b>USD 229</b>	)	
Self-Insured Respondent	)	

**ORDER**

**STATEMENT OF THE CASE**

Claimant appealed the July 9, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Dale E. Bennett of Westwood, Kansas, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 9, 2014, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

**ISSUES**

Claimant underwent a right carpal tunnel release on July 25, 2013, and a left carpal tunnel release on August 8, 2013, by Dr. Anne R. Rosenthal. Respondent does not dispute claimant's bilateral carpal tunnel syndrome was work related. At the July 9, 2014, preliminary hearing, claimant requested additional medical treatment. Claimant contends the additional treatment is needed for bilateral hand pain and weakness, numbness in her fingertips and pain radiating from the wrists into the elbows. Claimant did not specify the medical treatment she sought.

The ALJ denied claimant's request, stating:

The claimant's original symptom of bilateral hand numbness was significantly improved by the carpal tunnel surgery. The residual symptoms of pain and weakness are of more recent origin and the preponderance of the evidence proved these symptoms were due to arthritis rather than carpal tunnel syndrome. The

claimant's carpal tunnel syndrome has reached maximum medical improvement, and the preponderance of the medical evidence showed the arthritis was not an injury arising out of the employment.<sup>1</sup>

Claimant asks the Board to reverse the preliminary hearing Order and find she is entitled to additional medical treatment. Respondent asserts claimant reached maximum medical improvement and the Board has no jurisdiction to consider an order denying additional medical benefits. In the alternative, respondent asks the Board to affirm the ALJ's finding that claimant's work activities were not the prevailing factor causing her need for additional medical treatment.

The issues on appeal are:

1. Does the Board have jurisdiction to consider claimant's appeal?
2. Were claimant's work activities the prevailing factor causing her current need for medical treatment?

#### **FINDINGS OF FACT**

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant was a food service worker who developed bilateral carpal tunnel syndrome as the result of her repetitive work activities at respondent. At the time of the preliminary hearing, claimant was nearly 65 years of age. In her application for hearing, claimant alleged July 25, 2013, as her date of injury.

Claimant received physical therapy after her carpal tunnel releases. Claimant testified that after her carpal tunnel releases, her fingers were no longer numb, "but the pain persisted in my hands and the thumbs got really weird. It was strange. I've got a trigger thumb thing going on and I was told the workman's comp couldn't do anything about that."<sup>2</sup> Claimant testified the pain originates in the fatty part of her thumbs and goes into the wrists and hands.<sup>3</sup>

Claimant indicated she returned to work, 6½ hours per day, around October 14, 2013. She testified she was given a different job than before her surgeries. Her new job required more lifting, pulling and pushing. After returning to work, claimant's pain

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<sup>1</sup> ALJ Order at 1.

<sup>2</sup> P.H. Trans. at 6.

<sup>3</sup> *Id.* at 20.

worsened. Claimant indicated she could not hold on to things and was dropping items. Claimant indicated she was eventually terminated for not coming to work due to pain in her hands. Claimant testified her family physician, Dr. Douglas S. Anderson, recommended additional treatment.

Following her carpal tunnel releases, claimant had several follow-up visits with Dr. Rosenthal. The doctor's notes from visits with claimant on August 16, September 11, and October 9, 2013, indicated claimant was doing well.

Claimant was examined by Dr. Rosenthal again on October 29, 2013. Dr. Rosenthal noted there were questions concerning claimant not going to therapy and having a lot of pain. According to the doctor's notes, claimant indicated her palms were sore, but claimant's main complaint of soreness was her "right thumb CMC joint and also the STT region."<sup>4</sup> Claimant indicated that at her job, she had to exceed Dr. Rosenthal's restrictions. Dr. Rosenthal noted she went over claimant's x-rays with her. The doctor indicated she showed claimant her x-rays from their first visit that revealed arthritis. According to Dr. Rosenthal, claimant then replied she was told at their first visit she did not have arthritis. Dr. Rosenthal stated:

I explained to Ms. Katz that I never told her she does not have arthritis. What I told her was that her symptoms that were work related were coming from her carpal tunnel syndrome, but she does have arthritis. At this point in time, her main complaint in the right hand is her arthritis.<sup>5</sup>

During a November 6, 2013, appointment, Dr. Rosenthal advised claimant that she thought claimant was doing fine from a carpal tunnel standpoint and her pain complaints were coming from arthritis. On November 15, 2013, Dr. Rosenthal indicated claimant could return to full duty. The doctor indicated claimant reported during a November 11, 2013, functional capacity evaluation that when she uses her hands, she gets sharp pain along the dorsal right wrist and the back of the left hand. Dr. Rosenthal stated:

Please note that in the office, she had a little bit of tingling throughout the tip of the index finger on the right, but the rest of her numbness was gone. She does have osteoarthritis in both of her hands which is degenerative in nature and not vocationally related. I believe any restrictions that would need to be placed on her are due to her hand arthritis and not due to her carpal tunnel releases. From [a] carpal tunnel standpoint, which is what is vocationally related, I see no reason why she cannot do her full duty job. I have explained to Ms. Katz in [the] past several

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<sup>4</sup> *Id.*, Resp. Ex. A.

<sup>5</sup> *Id.*

times that her carpal tunnel syndrome is what is causing her numbness and tingling in both of her hands and that portion is vocationally related and the arthritis is not.<sup>6</sup>

When asked about her discussions with Dr. Rosenthal, claimant testified:

Q. Dr. Rosenthal's records contain several references to these discussions that her records reflect that she had with you about arthritis. As I understand your testimony today, what you're saying is you never had these discussions with Dr. Rosenthal?

A. I never had any arthritis. Any time she would bring anything up about arthritis, I would say I do not have arthritis. I've never had arthritis. I've never been diagnosed with arthritis or treated.

Q. So why didn't you believe her when she's telling you you have arthritis?

A. Because she started making it sound like everything that was going on was directly related to arthritis and it couldn't have been.<sup>7</sup>

On December 15, 2013, claimant was examined by Dr. Anderson. The doctor indicated claimant had pain with movement of the joints bilaterally in the thumbs, pain in the hands and in the digits, numbness in the fingertips, weakness in the hands and difficulty lifting items, especially fine items. Claimant also reported tenderness in the forearms with grip and continued numbness in the fingertips with tapping of the wrist. Dr. Anderson's assessment was:

Continued pain in hands and forearms.

I believe a component of this pain is secondary to some arthritic changes. I am quite certain that much of her symptomatology is secondary to on the results carpal tunnel syndrome pathology. I have instructed the patient to obtain further evaluation through the work comp system since [it] is almost certainly a work comp issue. I believe this patient has the right for second opinion and to appeal the findings and evaluation of her original treating physician within the work comp system. Patient has been instructed to obtain and or discuss her case with an attorney so that this can be pursued in an efficient and timely fashion.<sup>8</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 18.

<sup>8</sup> *Id.*, Cl. Ex. 1 at 2.

**PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2013 Supp. 44-534a(a)(2) states, in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

Respondent argues the Board lacks jurisdiction to review the ALJ's denial of medical treatment. However, the Board has held that when the underlying point of contention is whether claimant's accident was the prevailing factor in causing the medical condition, the Board has jurisdiction under K.S.A. 2013 Supp. 44-534a.<sup>9</sup> This Board Member finds the Board has jurisdiction to consider claimant's appeal, as the underlying issue is whether claimant's work activities were the prevailing factor causing her need for additional medical treatment.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>10</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."<sup>11</sup>

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<sup>9</sup> *Wilson v. Triangle Trucking, Inc.*, No. 1,063,281, 2013 WL 6920087 (Kan. WCAB Dec. 20, 2013); *Kornmesser v. State of Kansas*, No. 1,057,774, 2013 WL 3368484 (Kan. WCAB June 14, 2013).

<sup>10</sup> K.S.A. 2013 Supp. 44-501b(c).

<sup>11</sup> K.S.A. 2013 Supp. 44-508(h).

K.S.A. 2013 Supp. 44-508 states, in part:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

. . .

(f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Claimant ardently denied having arthritis in her hands. However, Drs. Anderson and Rosenthal agreed claimant has arthritis in her hands. Dr. Anderson thought much of claimant's symptomatology was secondary to her carpal tunnel syndrome and was almost certainly a workers compensation issue. Conversely, Dr. Rosenthal indicated claimant's recent pain symptoms were caused by arthritis in her hands and were not work related. This Board Member finds Dr. Rosenthal's assessment most credible and claimant's work activities were not the prevailing factor causing her current need for medical treatment. Claimant's only residual symptom from her carpal tunnel releases was minimal numbness in one or more fingers. Her present symptoms of pain and weakness and current need for medical treatment stem from her arthritis.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>12</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>13</sup>

**WHEREFORE**, the undersigned Board Member affirms the July 9, 2014, preliminary hearing Order entered by ALJ Hursh.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 2014.

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

c: Dale E. Bennett, Attorney for Claimant  
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Christopher J. McCurdy, Attorney for Respondent  
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Honorable Kenneth J. Hursh, Administrative Law Judge

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<sup>12</sup> K.S.A. 2013 Supp. 44-534a.

<sup>13</sup> K.S.A. 2013 Supp. 44-555c(j).